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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/617,676	07/14/2003	Frederic Legrand	05725.1227-00	4116
22852	7590	04/23/2007	EXAMINER	
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 901 NEW YORK AVENUE, NW WASHINGTON, DC 20001-4413			AHMED, HASAN SYED	
		ART UNIT	PAPER NUMBER	
		1615		
SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE		
3 MONTHS	04/23/2007	PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/617,676	LEGRAND, FREDERIC
Examiner	Art Unit	
Hasan S. Ahmed	1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 19 January 2007.  
 2a) This action is FINAL. 2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-32 is/are pending in the application.  
 4a) Of the above claim(s) 23-32 is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1-22 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date: _____
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)	5) <input type="checkbox"/> Notice of Informal Patent Application
Paper No(s)/Mail Date: _____	6) <input type="checkbox"/> Other: _____

## DETAILED ACTION

- Receipt is acknowledged of applicant's remarks, which were filed on 19 January 2007.
- The obviousness-type double patenting rejection is withdrawn in view of the remarks.

\* \* \* \* \*

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-22 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Dias (U.S. Patent No. 6,540,791) in view of Legrand, et. al. (U.S. Patent No. 6,260,556), further in view of Caes, et. al. (U.S. Patent No. 6,423,306).

Dias teaches a hair bleaching composition and a method of making a hair bleaching composition comprising the polydecene of instant claims 1, 3-5, 18, and 21 (see col. 23, line 12), the nonionic amphiphilic polymers of instant claim 16 (see col. 15, lines 37-48), the peroxygentated salt (perborate) of instant claim 10, the alkaline agent (ammonium salts) of instant claims 13 and 14, and the surfactants of instant claim 17 (see col. 9, lines 52-59). The composition may be in the paste form of instant claims 1, 18, and 21 (see col. 49, line 36).

Dias explains that by combining the disclosed ingredients into one composition, "...stable hair bleaching and/or coloring compositions can be made which are safe and effective for use on mammalian hair and which provide ... (increased) shelf-life and bleaching effect benefits..." See col. 3, lines 34-38.

The Dias reference differs from the instant application in that it does not disclose the particular peroxygenated salts of instant claim 11 or the hydrogen peroxide of instant claims 21 and 22.

Legrand, et. al. teach anhydrous compositions for bleaching keratin fibers (see col. 1, lines 1-13). The disclosed composition consists of, *inter alia*, the sodium persulphate of instant claim 11 (see col. 17, line 6), and hydrogen peroxide (see col. 1, line 19).

The Dias reference differs from the instant application in that it does not disclose the polydecene of claims 1, 3, 18, and 20-22, in which at least 30 carbon atoms are presented in the claimed formula.

However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to make such a composition by incorporating a polydecene compound having at least 30 carbon atoms because the Dias reference teaches clearly that polydecene compounds having more than 19 carbon atoms can be used in the composition (see col. 23, lines 1-12). Thus, a person of ordinary skill in the art would be motivated to use hydrocarbon polymers having more than 19 carbon atoms, including those claimed, and would expect such a composition to have similar properties to those claimed, absent unexpected results.

The Dias reference differs from the instant application in that it does not disclose the gelling agent of instant claims 1, 6-9, 18, 21 and 22.

Caes, et. al. teach cosmetic compositions for use on hair, including pastes (see col. 5, line 60; col. 6, lines 30-39).

The disclosed composition consists of the gelling agent of instant claims 1, 6-9, 18, 21 and 22, including the particular hydrogenated block copolymers of instant claim 9.

Caes, et. al. explain that use of multi-block copolymers in a cosmetic composition provides the benefits of, "...very good adherence to the substrate, flexibility, wearability, good dry time, non tacky, good retention, non transfer, and low migration over time." See col. 1, lines 53-56.

While the Dias reference does not explicitly teach all the instant claimed percentages of agents, it would have been obvious to one of ordinary skill in the art at the time the invention was made to determine suitable percentages through routine or manipulative experimentation to obtain the best possible results, as these are variable parameters attainable within the art.

Moreover, generally, differences in concentration will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." *In re Aller*, 220 F.2d 454, 456; 105 USPQ 233, 235 (CCPA 1955).

Applicants have not demonstrated any unexpected or unusual results, which accrue from the instant percentage ranges.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make an anhydrous paste comprising a peroxygenated salt, an alkaline agent, a polydecene, and a gelling agent, as taught by Dias in view of Legrand, et. al., further in view of Caes, et. al.

One of ordinary skill in the art at the time the invention was made would have been motivated to make an anhydrous paste comprising a peroxygenated salt, an alkaline agent, a polydecene, and a gelling agent for the beneficial effects of stable hair bleaching and/or coloring compositions which are safe and effective for use on mammalian hair and which provide increased shelf-life and bleaching effect benefits, as well as very good adherence to the substrate, flexibility, wearability, good dry time, non tacky, good retention, non transfer, and low migration over time, as explained by Legrand, et. al. and Caes, et. al.

\* \* \* \* \*

#### ***Response to Arguments***

Applicant's arguments filed 19 January 2007 have been fully considered but they are not persuasive.

#### **35 USC 103**

1. Applicant argues that, "...Dias discloses that its composition may comprise a diluent, which is preferably water...Also, all of the examples disclosed in Dias use water

as a diluent...All of these disclosures teach firmly away from an anhydrous product."

See remarks, page 4, first paragraph.

Examiner respectfully submits that Dias teaches water as merely a *preferred* diluent (see col. 4, line 66). Disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure or nonpreferred embodiments. *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). See MPEP 2123. Indeed, Dias teaches alternatives to water (see col. 46, line 67 – col. 45, line 11; col. 50, lines 36-44).

It should be noted that applicant does not disclose a complete absence of water (see specification, paragraph 0023).

2. Applicant argues that it would not have been obvious to arrive at the instantly claimed concentration range of polydecene by routine experimentation. See remarks, page 4, first full-paragraph.

"The law is replete with cases in which the difference between the claimed invention and the prior art is some range or other variable within the claims. . . . In such a situation, the applicant must show that the particular range is critical, generally by showing that the claimed range achieves unexpected results relative to the prior art range." *In re Woodruff*, 919 F.2d 1575, 16 USPQ2d 1934 (Fed. Cir. 1990). See MPEP § 716.02 - § 716.02(g) for a discussion of criticality and unexpected results. See MPEP 2144.05. Examiner respectfully submits that applicant has not shown the requisite criticality or unexpected results to overcome the obviousness rejection.

3. Applicant argues that examiner has used impermissible hindsight in applying the polydecene taught by Dias in the 35 USC 103 rejection. See remarks, paragraph bridging page 4 and page 5.

Examiner respectfully submits that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Dias shows that use of a polydecene compound having at least 30 carbon atoms in an anhydrous paste for bleaching human keratin fibers was within the level of ordinary skill at the time the claimed invention was made (see 35 USC 103 rejection, above).

\* \* \* \* \*

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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***Correspondence***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Hasan S. Ahmed whose telephone number is 571-272-4792. The examiner can normally be reached on 9am - 5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael P. Woodward can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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*Humera M. Sheikh*  
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PRIMARY EXAMINER